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## Anti-trust Laws -- Borah-Van Nuys Act -- Damages

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## NOTES AND COMMENTS

### Anti-trust Laws—Borah-Van Nuys Act—Damages

In 1936, Congress undertook to strengthen Section 2 of the Clayton Act, a federal anti-trust law designed to prohibit certain types of price discrimination. Besides the Robinson-Patman Act, which divided Section 2 into several amendments,<sup>1</sup> the revision resulted in the addition of another section known as the Borah-Van Nuys Act.<sup>2</sup> This latter amendment has been described as a "grotesque manifestation of the scissors and paste pot method of drafting a potentially drastic criminal statute."<sup>3</sup> Like Section 2 of the Robinson-Patman Act, it prohibits price and service discriminations. Because of the difference in the language of the statutes, however, conduct which is allowed under Section 2 of the Robinson-Patman Act may be prohibited under the Borah-Van Nuys Act. To illustrate, under the former Act a prerequisite to illegality is two sales involving price discriminations,<sup>4</sup> whereas under the latter Act a mere contract to make one sale is a violation.<sup>5</sup>

Perhaps it is because the Borah-Van Nuys Act expressly provides criminal penalties for violations that early critics concluded that this section imposed only a criminal liability on the violator.<sup>6</sup> To date, however,

<sup>1</sup> 38 STAT. 730, 15 U. S. C. § 13 (1914), as amended, 15 U. S. C. § 13 (1946).

<sup>2</sup> 15 U. S. C. § 13a (1946). It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

<sup>3</sup> Oppenheim, *Should the Robinson-Patman Act Be Amended?* Robinson-Patman Act Symposium, C. C. H. 141, 153 (1948).

It has been recommended that this Act be repealed. Oppenheim, *Federal Anti-trust Legislation: Guideposts To A Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1209 (1952).

<sup>4</sup> *Shaw's, Inc. v. Wilson-Jones Co.*, 105 F. 2d 331 (3d Cir. 1939).

<sup>5</sup> *A. J. Goodman and Son, Inc. v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D. Mass. 1949).

<sup>6</sup> "If section 3 were open to enforcement by private litigants, it would certainly give rise to an enormous amount of harassing litigation. Fortunately section 3 seems to be drawn so that only the Government authorities can enforce it. . . . No means of enforcing Section 3 is expressly provided in the Robinson-Patman Act except criminal actions by the Attorney-General. Except where such rights

the Department of Justice has made little, if any, effort to enforce this law, and, as yet, no alleged offender has suffered the authorized fine or imprisonment.

By 1942, however, injured parties began seeking civil relief under the Act, and in that year two suits involving damages were decided. The Federal District Court of Texas, applying the damages provision of the anti-trust laws to the Borah-Van Nuys Act, stated that damages could be recovered,<sup>7</sup> and in the same year, the Court of Appeals for the Eighth Circuit indicated that it would decide the same way if faced squarely with the issue.<sup>8</sup>

In 1947, the Supreme Court of the United States, referring to the Act, stated:

"... any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."<sup>9</sup>

Subsequent to this dictum, there has been a noticeable increase in litigation involving this section of the anti-trust laws.

In 1949, the federal courts decided favorably for the plaintiffs in three cases on the question of whether damages would be recovered under the Act, although no awards were actually made.<sup>10</sup> In the following year, three courts again stated that damages were recoverable

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are expressly given no private litigant can enforce laws of this character." 22 A. B. A. J. 593, 649 (1936). See also Hamilton and Loevinger, *The Second Attack On Price Discrimination: The Robinson-Patman Act*, 22 WASH. U. L. Q. 153, 182 (1937); Legislation, 50 HARV. L. REV. 106, 121 (1936); Legislation, 85 U. PA. L. REV. 306, 312 (1937).

<sup>7</sup> *Atlanta Brick Co. v. O'Neal*, 44 F. Supp. 39, 43 (E. D. Tex. 1942). "It (section 13a) does not provide in express terms that persons injured by things forbidden shall have a cause of action but by declaring them unlawful, the person so injured, I think is entitled to invoke its provisions, if he can allege and prove injury approximately caused by such violations."

<sup>8</sup> *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic and Pacific Tea Co.*, 131 F. 2d 419, 422 (8th Cir. 1942). "Appellees also argue that section 3 of the Robinson-Patman Act, 15 USCA 13a, on which the third count of the complaint is based, is a criminal act and not a part of the anti-trust laws within the meaning of Section 7 of the Sherman Act, giving the right of action for damages in a civil suit. . . . There is authority to the contrary. *Midland Oil Co. v. Southern Refining Co.*, D. C., 41 F. Supp. 436; *Kentucky-Tennessee L. & P. Co. v. Nashville Coal Co.*, 37 F. Supp. 728. But the question raised is not necessary to this case, and we do not decide it."

Apparently, when the court cited the two cases above, it made the understandable mistake of confusing section 13(a) of Title 15, U. S. C. (Robinson-Patman Act) with section 13a of Title 15, U. S. C. (Borah-Van Nuys Act).

<sup>9</sup> *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 750 (1947).

<sup>10</sup> Two of these cases were dismissed because certain prerequisites to defendants' liability were not shown. *A. J. Goodman and Son, Inc. v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D. Mass. 1949); *Atlantic Co. v. Citizens Ice and Cold Storage Co.*, 178 F. 2d 453 (5th Cir. 1949). In the third case, the defendant's motion to dismiss was denied. *Gordon, Wolf, Cowen Co. v. Independent Halvah and Candies, Inc.*, 9 F. R. D. 700 (S. D. N. Y. 1949).

under the Act by the injured party.<sup>11</sup> One court reasoned that inasmuch as the Borah-Van Nuys Act attacked problems of monopoly and competition in interstate commerce, it was therefore an anti-trust law to which the treble damages provision of the anti-trust law applied.<sup>12</sup> In *Balian Ice Cream Co. v. Arden Farms Co.*,<sup>13</sup> defendants, who sold dairy products in the Pacific coast states, allegedly acted in concert to reduce the wholesale price of their ice cream in the Los Angeles area to an unreasonably low figure. Their motion to dismiss a suit for damages brought by local competitors was denied, the court stating that "... absent a specifically expressed contrary legislative intent . . ." a civil action would lie for violation of the Borah-Van Nuys Amendment.<sup>14</sup>

Similar conclusions were reached by the federal courts sitting in California and Illinois in 1951.<sup>15</sup>

Despite the trend in favor of civil liability under the Act at least one tribunal has recently taken a contrary view. The District Court of the District of Columbia, without passing on the question, stated, "The court is inclined to the view that no action for damages or for an injunction is maintainable under the section in question."<sup>16</sup>

The majority appear to have construed the Borah-Van Nuys Act correctly. The fact that it provides its own penalties does not of itself preclude civil liability pursuant to other sections of the anti-trust laws. The Sherman Act is also a criminal statute, imposing like penalties,<sup>17</sup> yet there is no doubt that treble damages can be recovered by parties injured under it.<sup>18</sup> Section 4 of the Clayton Act,<sup>19</sup> which provides for treble damages, does not limit such awards to injuries resulting from violations of the Clayton Act, but instead allows them for harm caused by breaches of the "antitrust laws." Thus it is broad enough to include the Borah-Van Nuys Act. The legislative history of the Act supports

<sup>11</sup> *Moore v. Mead Service Co.*, 184 F. 2d 338 (10th Cir. 1950); *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796 (S. D. Cal. 1950); *Spence v. Sun Oil Co.*, 94 F. Supp. 408 (D. Conn. 1950).

<sup>12</sup> *Spence v. Sun Oil Co.*, 94 F. Supp. 408 (D. Conn. 1950).

<sup>13</sup> 94 F. Supp. 796 (S. D. Cal. 1950).

<sup>14</sup> *Id.* at 802.

<sup>15</sup> *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S. D. Cal. 1951); *Hipps v. Bowman Dairy Co.*, C. C. H. TRADE CASES REP. ¶ 62,859 (1950-51); *F. and A. Ice Cream Co. v. Arden Farms*, C. C. H. TRADE CASES REP. ¶ 62,848 (1950-51).

<sup>16</sup> *National Used Car Market Report, Inc. v. National Auto Dealers Ass'n.*, 108 F. Supp. 692, 694 (D. C. Cir. 1953).

<sup>17</sup> 15 U. S. C. §§ 1 and 2 (1946).

<sup>18</sup> *Donovan and Irvine, Proof of Damages Under the Anti-trust Law*, 63 N. J. L. J. 297 (1940).

<sup>19</sup> 15 U. S. C. § 15 (1946). "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

the conclusion that an action for damages can be maintained under it.<sup>20</sup> Although the Borah-Van Nuys Act was undoubtedly intended to be used primarily as a criminal statute, indications are that it will not be used at all for this purpose but will probably be employed occasionally in civil litigation.

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### Bankruptcy—Partnerships—Partnerships in Bankruptcy

Approximately fifteen years have elapsed since the Chandler Act became law and amended the Bankruptcy Act. That Act, in making substantial changes to the partnership section, seems to have produced a relative tranquility over the years in that area of the law. But while the amended partnership section reconciled some earlier conflicts, it left others to be decided by the courts. This would appear, therefore, to be an appropriate occasion to take cognizance of the existing law, its development, and its conflicts.

Since a partnership is not defined in the Bankruptcy Act,<sup>1</sup> its existence in fact<sup>2</sup> must depend upon the applicable state laws. A partnership is generally looked upon as "an association of two or more persons to carry on as co-owners a business for profit."<sup>3</sup> In fact, this is the precise definition under the Uniform Partnership Act.<sup>4</sup> Every partner is an agent of the partnership for the purpose of its business and the acts of a partner in the ordinary course of the business binds the partnership and the partners. Also, partners are liable jointly for the debts and obligations of the partnership, and liable jointly and severally for a tort or breach of trust of another partner in the course of the partnership business. Because of these ordinary principles of partnership law, the "aggregate theory" is usually applied in describing the legal significance of a partnership.

The Bankruptcy Act, however, does not strictly adhere to the

<sup>20</sup> 80 CONG. REC. 9420 (1936). "Mr. Hancock of New York: 'If a vendor is found guilty of discrimination as provided in this bill (Borah-Van Nuys) is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?' Mr. Celler: 'If he violates the Borah-Van Nuys provision or other provision of the bill, he is subject to penalties of a criminal nature and has committed an offense.' Mr. Hancock: 'Would he also be liable for triple damages?' Mr. Celler: 'And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue.'"

<sup>1</sup> A partnership is included within the meaning of the term "person" in the Bankruptcy Act. 11 U. S. C. § 1(23) (1947).

<sup>2</sup> It must be proved that there is a partnership in fact and not a mere partnership by estoppel, and the burden of such proof falls upon the petitioner. *Buckingham v. First Nat. Bank*, 131 Fed. 192 (6th Cir. 1904).

<sup>3</sup> N. C. GEN. STAT. § 59-36 (1943 Recomp. 1950).

<sup>4</sup> *Id.* See also N. C. GEN. STAT. § 59-37 (1943 Recomp. 1950) for rules in determining the existence of a partnership.